NO. 80-1270

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

MICHAEL H. MITCHELL,
Petitioner,

vs.

AMALGAMATED COUNCIL OF GREYHOUND DIVISIONS, et al.,
Respondents.

BRIEF OF RESPONDENT AMALGAMATED COUNCIL OF GREYHOUND DIVISIONS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I. OPINIONS BELOW.

The opinions below, by the United States District Court for the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit, were unpublished. Copies of the opinions of the United States District Court are attached to the Petitioner's Petition for Certiorari.

II. JURISDICTION.

Petitioner seeks exercise of this Court's jurisdiction under 28 U.S.C. §1254(1).

III. QUESTIONS PRESENTED.

Whether this Court should grant a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, affirming the District Court decision that the Respondent Amalgamated Council of Greyhound Divisions (hereinafter "Council" or "Union"), did not violate its duty of fair representation under this Court's standards in Vaca v. Sipes, 386 U.S. 171 (1967), when Respondent refused to seek to arbitrate Petitioner's grievance over his seniority ranking.

IV. STATUTE INVOLVED.

This petition involves interpretation of Section 301 of the National Labor Relations Act, as amended (29 U.S.C. §185) which provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

V. STATEMENT OF THE CASE.

Petitioner, Michael Mitchell ("Mitchell") is a bus operator employed by Respondent, Greyhound Lines ("Greyhound"). At all times material to this case, Mitchell was based in Cleveland, Ohio, and was a member of Division 1043 of Respondent, Council. At all times

material to this case, the Council has been the exclusive bargaining agent for Mitchell and all other Greyhound operators. At all times material to this action, Greyhound and the Council were parties to a collective bargaining agreement.

The collective bargaining agreement establishes the seniority arrangements for employees covered by its terms. This case arose when Mitchell attempted to exercise his seniority and found that the job he sought was being held by another employee, Swipes, who was credited with more seniority than Mitchell.

Swipes began his employment as a bus driver on June 14, 1956. On June 1, 1958, Swipes became a dispatcher trainee. On January 16, 1959 he was promoted to dispatcher -- a supervisory position. Swipes remained a dispatcher until 1972

when he returned to bus driving. Mitchell started as a bus driver in May, 1961 and has occupied that position at all relevant times. During the period between 1959 and 1972, Swipes was carried on the seniority rosters with a seniority date of June 14, 1956. Mitchell's seniority date was May, 1961.

The collective bargaining agreement that governed the parties to this suit provided that employees with two or more years of seniority who change to supervisory positions shall retain and accumulate seniority while in such position. According to Mitchell, Swipes could not accumulate driver seniority while he was a dispatcher trainee and dispatcher because the dispatcher trainee position was managerial or supervisory, and thus Swipes was 13 days short of having the requisite two years of seniority when he

accepted that position.

Mitchell filed a grievance alleging that Swipes had been granted seniority in violation of the collective bargaining agreement. The Contract Interpretation Committee (CIC), manned equally by the Union and the Company, ruled against Mitchell. The CIC held that the position of dispatcher trainee was not supervisory, and therefore Swipes was entitled to seniority. After that decision, the Union elected not to carry the grievance to arbitration, because it believed that Mitchell's claim was without merit.

Mitchell then commenced this action in federal court. The District Court heard the case without a jury and ruled for the defendants. Judge Thomas held that the Union had not acted arbitrarily or perfunctorily. In so doing, the District Court:

> relied on the language of Article 1, "Recognition," by which clause the Union was recognized as the sole and exclusive bargaining collective bargaining representative for all employees "in the occupations as set forth in the wage provisions hereof. . . except for supervisory employees with the power to hire or fire or with the right effectively to recommend hiring or firing." It is undisputed that Swipes did not possess any of these powers as dispatcher trainee. Mitchell, supra, A.14 (District Court Op.).

On appeal, the Court of Appeals affirmed unanimously, ruling that the Plaintiff had failed to prove a breach of the duty of fair representation. The Court explicitly relied upon this Court's standards in Vaca v. Sipes, 386 U.S. 171 (1967), and Hines v. Anchor Motor Freight, 424 U.S. 554 (1976), and concluded that the Union neither ignored nor processed perfunctorily a meritorious grievance.

VI. ARGUMENT.

Summary.

The Petition for Certiorari was not timely presented under Rule 33, Supreme Court Rules.

On the merits, the Petitioner has not presented this Court with any reason to exercise its discretionary writ to review this case. There is no conflict in the Circuits; the Courts of Appeals are routinely applying the standards set forth in Vaca v. Sipes, supra, and Hines, supra, to decide the particular cases before them, and Petitioner has not set forth a single duty of fair representation decision from any other Circuit remotely resembling this case, with any different result. The Appeals Court's fidelity to this Court's recent pronouncements also obviate any claim to conflict with this Court's decisions. As this

case illustrates, the standards of Vaca and Hines are well understood and capable of being properly applied without further "elucidation." Finally, the standards were properly applied here; under the language of the collective bargaining agreement and settled labor law concepts, the disputed work was reasonably construed by the Defendants as non-supervisory.

A. The Petitioner Has Not Filed His Petition In A Timely Fashion.

This Petition was not filed in compliance with the Rules of this Court. Specifically, on November 12, 1980, Respondents received the Peition, over ninety days after the Court of Appeals order in this case, dated August 13,1980 (A.20). Petitioner's Petition not being in compliance with the Rules of this Court, it was rejected. Rule 33, Rules of the Supreme Court. Rule 33

provides that a Petition thus rejected may be refiled, but only if new and proper copies are promptly substituted (emphasis added).

Petitioner here waited seven weeks after rejection to refile. Clearly, this Court's Rule, intended to protect the rights of parties in unwitting non-compliance with technical requirements of form was not intended to add almost two months to the statutory ninety day certiorari period. Indeed, as this Court has repeatedly ruled, timely filing is jurisdictional. No reasonable construction of Rule 33 could support Petitioner's delay.

B. The Petitioner Has Not Set Forth One Reason Of The Character To Support Certiorari.

Petitioner cannot, and does not, point to a single criterion which would support certiorari here. There is no

conflict between the Circuits; the Court of Appeals has not addressed a federal question left unsettled by this Court nor issued a decision in conflict with this Court's decisions.

Plaintiff here simply disputes the Defendants' interpretation of the seniority provision of the collective bargaining agreement, particularly the classification of supervisory training, when seniority in the bargaining unit is calculated.

In Vaca, supra, Hines, supra, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), and Humphrey v. Moore, 375 U.S. 335 (1964) this Court set forth the standards to be applied in evaluating the Union's conduct.

The District Court and the Court of Appeals each specifically relied upon these standards in deciding that the Defendants did not breach their duty here:

So we finally, then, come down really to what Humphrey v. Moore was talking about where a union is riding, necessarily, on the backs of several horses, and, obviously, sometimes they go off in different directions, and the question is have they treated one horse more unfairly than another. Mitchell, supra, A. 11 (District Court Op.).

and:

The Supreme Court ruled on the standard for deciding fair representation cases in Vaca v. Sipes, 386 U.S. 171 (1967). There, the Court stated that a union does not violate its duty of fair representation when it makes decisions as to the merits of a grievance in a good faith and nonarbitrary manner. The Court noted that an individual employee does not have an absolute right to have a grievance taken to arbitration.

In Hines v. Anchor Motor Freight, 424 U.S. 554 (1976), the Court reiterated this standard, holding that a union violates its duty of fair representation only if it arbitrarily ignores a meritorious grievance or processes it in a perfunctory fashion.

Consistent with these decisions, this Court has held that a plaintiff must establish by a preponderance of the evidence arbitrary or bad faith conduct in duty of fair representation cases that

> the union decides are without merit. Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975); Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970).
>
> After a review of the record we can only agree with Judge Thomas' conclusion that appellant failed to establish a breach of the duty of fair representation by a preponderance of the evidence. Mitchell, supra, A. 22 (Court of Appeals Op.).

Petitioner's sole reason for asking this Court to review the decision below is that Vaca v. Sipes requires "amplification" and that "the factual setting of this case provides a unique opportunity" to amplify Vaca (Petition for Certiorari, p. 6).

Neither is the case. First, as the Fourth Circuit noted some years ago:

> The phrase "duty of fair representation" is a legal term of art, incapable of precise definition. St. Clair v. Local 515, Int'l. Bhd. of Teamsters, etc., 422 F.2d 128, 130 (6 Cir. 1969). There is no code that explicitly prescribes the standards that

> govern unions in representing their members in processing grievances. Whether a union breached its duty of fair representation depends upon the facts of each case. Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191 (4th Cir. 1963). (Griffin v. International U., United Automobile, A.&A.I.W., 469 F.2d 181 (4th Cir. 1972).

Second, this Court's articulated standard of arbitrariness and capriciousness in such cases is a legal concept of behavior, to be applied, like elementary concepts of "negligence" or "willfulness" to differing fact situations. The law is replete with guidelines to the standard, e.g.:

> . . . a decision must be considered "arbitrary and capricious" if the facts on which it is purportedly based are not supported by the record. Associated Industries of New York State, Inc. v. U.S.Dept. of Labor, 487 F.2d 342, 349-50 (2d Cir. 1973) (Friendly, J.). National Citizens Com. for Broadcasting v. F.C.C., 555 F.2d 938 (D.C. Cir. 1977).

and

> [5] Appellee's determination of necessity under the federal statute was "arbitrary and capricious" only if it "was without adequate determining principle or was unreasoned." United States v. Carmack, 329 U.S. 230, 243, 67 S.Ct. 252, 258, 91 L.Ed. 209 (1946). The state standard was no less severe. "Arbitrary and capricious conduct," the court said in City of Tacoma v. Welcker, supra, 399 P.2d at 335, "is wilful and unreasoning action, without consideration and regard for facts or circumstances [citing]. Action, when exercised honestly, fairly, and upon due consideration is not arbitrary and capricious, even though there be room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached." See also, State ex rel. Dawes v. Washington State Highway Commission, 63 Wash.2d 34, 385 P.2d 376, 380 (1965).
> (Chapman v. Public Utility Dist. No. 1 of Douglas Co. Wash., 367 F.2d 163 (9th Cir. 1966).

Corpus Juris Secondum offers a laundry list of guidelines to the legal standard:

> ARBITRARILY. Capriciously; in an arbitrary manner; without a rational basis; without any reasonable cause;

without fair, solid, and substantial cause and without reason given; without judgment or reason; a decision according to judgment or will; depending on the will alone; discretionary.

With reference to a line of action or the doing of an act, "arbitrarily" has been held to imply a disregard of evidence; that which is decided by a judge on his own and not according to law; without sufficient factual basis; without cause based upon the law; independent of law or rule.

The term "arbitrarily" may also mean, without adequate determining principle, not founded in the nature of things.

Under the particular facts of the case the word has been held to mean beyond an agreed or designated extent.

The term has been compared with "without justification or excuse; and has been distinguished from "absolutely;" "arbitrate;" and from "in good faith;" although it has been held not equivalent to "in bad faith," or "through ignorance or incompetency." (6 C.J.S. §143-4, citing Zully v. U.S., 60 F.Supp. 785; NLRB v. Esquire, 222 F.2d 253, 256; U.S. v. Lotempio, 58 F.2d 358, 360; Wilson v. U.S., 530 F.2d 772, 776.

In the years since Hines, the Courts of Appeals have successfully applied the doctrine without substantial further involvement by this Court. See, e.g., Smart v. Ellis Trucking Co., 580 F.2d 215 (6th Cir.) cert. den. (1978); DeBoles v. Trans World Airlines, 552 F.2d 1005 (3rd Cir.) cert. den. (1977); Franklin v. Crosley, 568 F.2d 1098 (5th Cir.) cert. den. (1978); Lewis v. Greyhound Lines East, 411 F.Supp. 368, aff'd. 535 F.2d 1053 (D.C. Cir.), cert. den. (1977).

C. The Facts Of This Case Make It Wholly Inappropriate For Reconsidering The Standards Of Fair Representation.

Finally, this case does not remotely present a desirable factual setting for further elucidation of the standards. As this Court has noted, allotting seniority rights among employees is an area

most heavily committed to the discretion of the collective bargaining representative. Humphrey, supra, 375 U.S., at 370, 372. Second, this case involves a peculiar factual situation, very unlikely to recur, in which the critical period for the employees' seniority ranking was the period of his training to be a supervisor. Not surprisingly, Petitioner has not cited a single case involving even analogous facts.

Third, the implication of discriminatory or arbitrary behavior is doubly remote here, because both parties made an initial determination to treat Swipes' supervisory training as part of his time in the bargaining unit was in 1969, long before Mitchell appeared on the scene to contest Swipes' status. (Mitchell, supra, A.9 (District Court Op.). Accordingly, implications of Union intent to harm or

indifference to Mitchell's interest are remote.

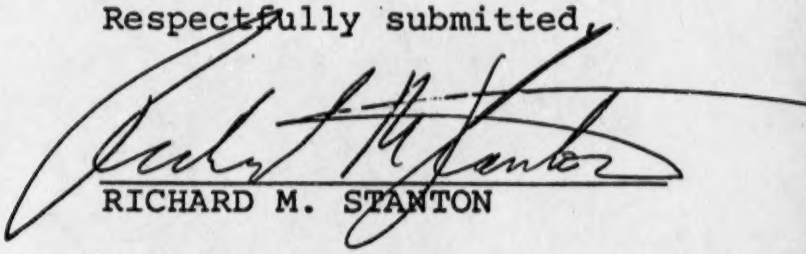
Finally, the District Court took evidence not only of the parties' early determination of Swipes' status, but heard lengthy testimony regarding his duties, and concluded that he did not have the power to "hire, fire or effectively recommend hiring and firing" and, accordingly, did not fit the contract definition of supervisor. Mitchell, supra, A.14 (District Court Op.).

In order to reverse the Courts below and "elucidate" the standards here, this Court would be reevaluating the live testimony on which the District Court relied. For all of these reasons, this case is highly unsuitable for the purpose Petitioner proposes, even assuming such elucidation were necessary, which it is not.

VII. CONCLUSION.

For the reasons set forth above this Court should not exercise its writ of certiorari in this case.

Respectfully submitted,



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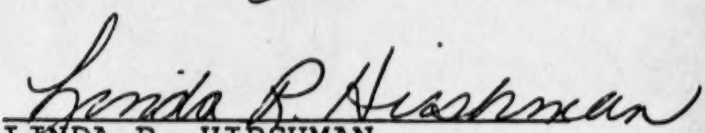

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